

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Patentees: Mark A. Holland and Nicole Lenihan

Patent No.: 7,550,283 B2

Group Art Unit: 1648

Issue Date: June 23, 2009

Examiner: Nicole Erin Kinsey White

Confirmation No.: 9018

For: BACTERIOPHAGE FOR LYSIS OF *METHYLOBACTERIUM* AND
COMPOSITIONS AND USES THEREOF

PETITION UNDER 37 CFR 1.181(a)(3)

Mail Stop Petition
Commissioner for Patents
P.O. Box 1450
Alexandria, Virginia 22313-1450

Dear Sir:

This Petition seeks supervisory review under 37 CFR 1.181(a)(3) from the Director of the U.S. P.T.O. with respect to the Decision from the Director of the Office of Petitions dated September 7, 2010 regarding the Patent Term Adjustment of the above identified application.

The dispute relates to the period beginning on January 11, 2009 and ending on February 9, 2009 (“the Period”). The Decision clearly states at Page 2, lines 3-5, that the so-called “B-period” excludes the period the application was on appeal, i.e., from January 9, 2009 (the filing date of the Notice of Appeal) to February 9, 2009 (the mailing date of the Notice of Allowance). 37 CFR 1.703(b)(4). Patentee does not dispute that the B-period *excludes* the Period. The Decision acknowledges that the period from January 11, 2009 to February 9, 2009 is included in the so-called A-period. 37 CFR 1.703(a); Decision, Page 2, lines 9-11. Patentee does not dispute that the A-period *includes* the Period. The Decision then goes on to allege that the A-period from January 11, 2009 to February 9, 2009 (pursuant to 37 CFR 1.703(a)), “overlaps” with the B-period. Page 2, lines 11-12. The Decision then reduces the patent term adjustment by 30 days, presumably under 37 CFR 1.703(f). Patentee does not dispute that the Office shall adjust the patent term and, to the extent the periods under Rule 703 overlap, to reduce the sum of overlapping periods by the days of overlap. 37 CFR 1.703(f). However, Patentee disagrees that the B-period in this patent “overlaps” with the A-period and seeks the Director’s supervisory review of the Decision.

The issue on petition is a simple one. Can the Period “excluded” (or “not included”) from the B-period “overlap” with an A-period that “includes” the Period? Of course, the only answer to this question is “no.” The plain meaning of the word “overlap” is “to extend over part of (a period of time, sphere of activity, etc.); coincide in part (with).” See, for example, Webster’s New World College Dictionary, 4th Edition at <http://www.yourdictionary.com/overlap>. The plain meaning of the word “exclude” is “to prevent from being included.” *Id.* at <http://www.yourdictionary.com/exclude>. The plain meaning of the word “include” is “to consider as part of a whole.” *Id.* At <http://www.yourdictionary.com/include>. *By definition*, a period which is “excluded” from the B-period cannot be “considered as part of” and, thereby, “extend” over or into or “coincide with” the B-period. The Period at issue was “excluded” in the B-period and “not included” or “considered a part of.” Because the B-period *stopped before* the Period at issue *began*, it simply did not “overlap” with, “coincide in part with” or “extend over” the A-period which included the Period. The plain meaning of these words require that only days “included” in *both* periods “overlap.”

The undersigned is not aware of any definition of the words “overlap,” “not include” and “exclude” which would support the Office of Petitions’ interpretation of the rules or statutes. The undersigned is not aware of any legislative history or other authority which would suggest that Congress intended these same words within 35 U.S.C. 154 to have a meaning other than their plain meaning. Indeed, the Office of Petitions result is absurd, arbitrary and capricious and contrary to the clear Congressional intent of the statute. Had the application not qualified for any B-period, the 30 days in the A-period would have simply *added* to the patent term adjustment. However, because the PTO *additionally* delayed in prosecution by extending prosecution for over 3 years, the Period is ignored completely. It appears that, in this case, two wrongs (not concluding prosecution within 3 years and delaying in issuing a Notice of Allowance) create an opportunity to make a third wrong (ignoring both delays). The clear and unequivocal Congressional intent in the requirement to reduce the patent term adjustment by the overlapping days was to prevent a single day of delay from counting twice because more than one PTO delay applied. However, in this case, these 30 days are not counted at all! This result is contrary to the Congressional intent of the statute and is believed to be an arbitrary and capricious application of Rule 703.

Application No. 10/821,640

It is respectfully submitted that the Office of Petitions erred in reducing the Patent Term Adjustment 30 days under 37 CFR 1.703(c).

Total Patent Term Adjustment of (499+774-176) or 1097 days is again requested.

Respectfully submitted,

ELMORE PATENT LAW GROUP, P.C.

/Carolyn S. Elmore/

Carolyn S. Elmore

Registration No: 37,567

Telephone: (978) 251-3509

Facsimile: (978) 251-3973

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